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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1886.

No. ~~619.~~ 44

EDWIN C. LITCHFIELD,
*Administrator of Grace H. Litchfield, deceased,*
PLAINTIFF IN ERROR,

*vs.*

EDWARD K. GOODNOW, DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

## ARGUMENT FOR PLAINTIFF IN ERROR.

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

# Supreme Court of the United States.

EDWIN C. LITCHFIELD, ADMINISTRATOR OF GRACE H. LITCHFIELD, DECEASED, *Plaintiff in Error*,

*vs.*

EDWARD K. GOODNOW, *Defendant in Error.*

No. 319.

*On Error from Supreme Court of Iowa.*

C. H. GATCH AND WILLIAM CONNOR, *for Plaintiff in Error.*

GEO. CRANE, *for Defendant in Error.*

## ARGUMENT FOR PLAINTIFF IN ERROR.

### STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation & Railroad Company, another Iowa corporation, and numerous grantees of the latter, including plaintiff in error, to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to

eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them (Fol. 23.)

And prayed—

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon (24).

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them *since 1861*, to the amount of $80,000, this defendant is ignorant and uninformed saved by the said complainant's said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees *since 1861*, is and has been unauthorized and wrongful (26).

The suit having, as stated, been commenced in the district court of Webster county was removed to the United States circuit court, and in due course of litigation this court affirmed the decree of the United States circuit court for Iowa, establishing title to the lands in the Des Moines Navigation & Railroad Company, and its several grantees, and denying the right of the homestead company to recover the taxes paid.

On the question of complainant's right to the alternative relief claimed, this court say—*Homestead Company vs. Valley Railroad*, 17 Wall., p. 167:

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit.

In the two cases of the *Dubuque & Sioux City Railroad Co. vs. the Supervisors of Webster County, Iowa*, and *Iowa Homestead Co. vs. same*, 40 Iowa, 16, the question was as to the right of recov-

ery of these identical taxes, by the assignor of defendant in error, from Webster county, and it was held that such recovery could not be had, for the reason stated in the following extract from the opinion:

> The payments having been made *voluntarily*, with knowledge of all the facts, believing that, under the law, the lands belonged to the plaintiffs, the mistake was one of law, and no action at the common law or in equity lies to recover the money thus paid. Page 17.

It will thus be seen that the sole ground upon which the right of recovery was denied was that the payment of the taxes had been voluntary.

In *Garrigan vs. Knight*, 47 Iowa, 525, it was held that —

> When the title to real estate is in controversy, and the taxes thereon are voluntarily paid by one of the parties to the controversy, whose claim is afterwards adjudged to be invalid, he cannot recover the amount so paid from the owner.

The decision in this case has never been overruled otherwise than by being in conflict with later decisions in the numerous "Goodnow cases," of which the case at bar is one.

In the first of these cases, that of *Goodnow vs. Moulton*, 57 Iowa, p. 555, prosecuted by Goodnow as assignee of the homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad* having been cited as authority, the supreme court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case, say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show with any degree of certainty that the right of the plaintiff to recover the taxes paid was in the case.

And, more strangely still, subsequently, in *Goodnow vs. Stryker*, 62 Iowa, 223, after having discovered the oversight in the Moulton case, it is said:

> Since the decision in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company.*

The question of voluntary payment having been thus disposed of, it became necessary in that case to dispose of the further defense relied on, that the claim was barred by the New York statute of limitations, and this involved the real and decisive question, *when* and *how* did the cause of action accrue? which the opinion thus discusses and determines:

> We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which the action is based arose by reason of the circumstances. See *Goodnow vs. Moulton*, above cited. One very important circumstance was that the title was involved in serious litigation, which was not terminated in the defendant's favor until 1873. We do not think the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should be adjudicated to be in the Iowa Homestead Company, and no one had any reason to suppose he intended to incur any such liability. The most that can be said then in regard to the defendant's implied promise is, that it was based upon a contingency, and being so, it was not enforcible until the contingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant.

Plaintiff in error accepting this as settling the proposition that a cause of action accrued to the homestead company by "the termination of the litigation by which the title was adjudicated to be in the defendant," the Des Moines Navigation & Railroad Company, plead as one of its defenses in this case, the New York statute of limitations, of which state the intestate Grace H. Litchfield, was a citizen, relying on the decision of this court in the cases of *Wolcott vs. The Des Moines Company*, and *The Des Moines Company vs. Burr*, 5 Wall., 681 and 689, as being such termination of that litigation. For answer, setting up this defense, see record (9), and for the evidence showing the intervention of the homestead company in the two last named cases, see record (89-99).

This suit having been commenced against Grace H. Litchfield in her lifetime, was, after her death, revived against the plaintiff in error as her administrator.

Grace H. Litchfield was not named in the record as a party to the homestead company suit, in which the prior adjudication relied on as a defense was had, but it is claimed that she was in fact a party in such sense as to have been entitled to the benefit of the adjudication, and to have been bound by it had the same been adverse to her interest. It is admitted (24), that the lands on which the taxes in question were paid, were embraced in the lands, the title to which were in question in that suit, and the taxes—the recovery of which was also claimed therein, in the event of the question of title being determined adversely to the homestead company—were *all* of the taxes paid on *all* of the lands, the title to which was in question; and it is shown by the deposition of John Brown (105–6), that he had been the agent of Grace H. Litchfield ever since the summer of 1866; as such agent it was his business to sell and pay taxes on her Iowa lands; "to attend to all matters of litigation in this state affecting the land of defendant in any manner;" that he accepted service for the defendants, of the original notice, in this homestead company case; that during the pendency of the suit, he "had charge, as agent, of the interests of nearly all of the non-resident owners, *including those of the defendant;* * * * retained counsel and paid all of the expenses and fees of counsel incurred in the litigation. In all of which defendant's lands were protected," by him, "as her agent, as were the lands of all the other non-residents, who had derived title from the Des Moines Navigation & Railroad Company," for whom he was agent; that "to pay expenses and counsel fees," he "assessed the non-resident owners, *including the defendant* and her husband, *according to their interest in the land involved in the controversy;*" that "the *defendant's portion of the assessment* was included in charges made in" his "accounts with the defendant's husband, amounting in all to about $1,400," and that "these charges were made *with the knowledge and consent of defendant* and her husband."

The following is the certificate, which, together with the foregoing, will constitute a sufficient statement of the case, and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the Supreme Court of Iowa in other similar cases:

CERTIFICATE.

And now, on application of the defendant, Edwin C. Litchfield, administrator of Grace H. Litchfield, deceased, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of defendant, in defendant's assignment of errors in the additional abstract, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that, as was claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company, by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation & Railroad Company*, this defendant and others, at the October term thereof, A. D. 1872, to which case it was claimed that said Grace H. Litchfield, though not named as such in the record, was a party defendant in such sense as to have been bound by and entitled to the benefits of the adjudication therein, and that our decision herein was and is against the immunity so claimed.

And it is further certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceding the commencement of the action, was barred by the New York statute of limitations, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States, in the case of *Samuel G. Wolcott vs. The Des Moines Navigation & Railroad Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final.

## Assignment of Errors.

Said supreme court of the state of Iowa erred,—

I. In holding that defendant in error is not estopped from prosecuting his cause of action herein by the judgment of the supreme court of the United States in the case of the *Homestead Company vs. Valley Railroad*, 17 Wallace, 153; and thereby denying the immunity claimed by plaintiff in error by reason of that judgment, under the defense of former adjudication.

II. In deciding the meaning and effect of the decision of the supreme court of the United States in the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, to be such as to defeat the defense of the New York statute of limitations, plead by plaintiff in error as a defense to the action; and thereby denying the immunity claimed by plaintiff in error under said decision, upon the true meaning and effect of which said supreme court of Iowa found and held said defense to depend.

## ARGUMENT.

It is claimed that the record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the supreme court of Iowa, the first of which was erroneously decided against the plaintiff in error, and the second of which was either also erroneously decided against him, or its decision was wrongfully and erroneously evaded. As to each, the question whether or not it is a *federal* question, so involves the question whether or not the decision was or was not erroneous, that the same argument will apply to both.

*First.*—Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judg-

ment therein having been against the validity of such demand.

*Second.*—The plaintiff in error claimed immunity from the demand of the defendant in error, because, *by force and virtue of the decision of this court* in the case of *Wolcott vs. Des Moines Company*, 5 Wall., 681, and the *Des Moines Company vs. Burr, Id.*, 689, the cause of action accured, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the statute of limitations of the state of New York.

The decision of this question, and the necessity therefor, by the supreme court of Iowa, are thus stated in the certificate found on page 126 of the original record:

> To determine whether or not it was so barred, it became necessary to decide whether or not the decision of the supreme court of the United States in the case of *Samuel G. Wolcott against the Des Moines Navigation and Railroad Company was a final determination of the question therein decided.* * * * And our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed *because of our said decision that said determination was not final.*

I.

If Grace H. Litchffeld was a party to the homestead company case in such sense that she might claim the benefit of the adjudication, then it will not be denied that the claim of immunity thereunder involves a federal question of which this court has jurisdiction.

Was she a party in such sense?

Her lands were included among those to which the complainant company sought to establish title in istelf, and it will be seen by reference to the extracts from the pleadings contained in the statement that the taxes for the years 1861–62–63, were claimed in the same terms, as were those of the subsequent years, as part of the whole amount of $80,000, claimed to have been paid. In *Goodnow vs. Litchfield*, 59 Iowa, 226, the de-

fense of former adjudication as to the taxes of the subsequent years was sustained.

She elected, as she might, but was not bound to do, to unite with those who were made defendants of record in the former suit, in resisting both of these demands. Having thus, in fact, had a *contention* with the complainant as really and as *effectively* as if she had been a defendant of record, would she have been bound by an adverse result?

The question is not whether judgment could have been entered up against her in that case, but whether had the company, in that event of the suit, thereupon commenced precisely the same character of suit against her as to her lands and her share of the taxes only, she could have been heard to say that she had not already had her "day in court."

If she was in such sense a party as to be bound by the judgment, it can make no difference that the question whether or not she was such party is not a federal question. Plaintiff in error cannot be deprived of the immunity of his intestate as a party because the fact that she was a party, was shown by other than the usual record evidence, and a question, not federal, was raised as to whether or not the evidence relied on was sufficient. But it will hereafter be shown that it was a federal question.

In *Chicago vs. Robbins*, 4 Wallace, 657, this court, on page 674, stating the rule generally as to when persons other than parties of record are bound by the adjudication, say:

> Persons notified of the pendency of a suit in which they are directly interested, must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efefficently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced.

In *Conger vs. Chilcote*, 42 Iowa, 18, it was held that—

> One who is benefited by the prosecution or an action of which he has

notice, is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment rendered.

And that—

No particular form of notice is required, and it may be given, either orally or in writing.

The first of these propositions having been in substance held by the court below in an instruction to the jury, the supreme court, on pages 23–4, say:

The instruction clearly announces the rule, that in order to hold defendant so bound, he must be found to have been a party in interest. In such case he would be bound, though his name were not used as a party to the action. We understand the instruction, so far, to mean this: If the action was prosecuted *in whole or in part for defendant's benefit*, if he were to share in the fruits of the judgment, he is to be regarded as a party in interest, and in that case is bound by the judgment rendered therein. We think there can be no doubt of the correctness of the rule. If he had such an interest in the matter involved in the action, and entrusted it to the Mt. Pleasant bank for settlement by suit, he will be estopped to deny the matters adjudicated therein.

It was claimed in argument in the state court that it is only when persons not parties of record are in privity with those who are, that the adjudication can be binding upon them or inure to their benefit. If one, not a party, is bound by the adjudication as between himself and the party with whom he had a common interest, and was in privity, and whom he therefore, assisted, or had opportunity to assist, why should he not also be bound if the subsequent suit is between himself and the common adversary in the former suit? If in the former case he is bound because of his interest in the subject matter of the litigation, and his opportunity to be heard, why should he not for the same reasons be bound in the latter case? Mrs. Litchfield was not simply interested in the questions of law involved in the homestead company suit—the title to her land and, alternatively, her share of the taxes paid, were claimed in the same manner and terms as were the title and shares of the defendants named in the bill, and she was thereby led to assist in the defense of the suit—was, in fact, represented by counsel

employed by her agent, and contributed *her proportionate share* of the expenses of the litigation.

While the question has most frequently arisen between parties and those who on account of privity were liable over to them, cases are not wanting in which the subsequent litigation, as in this case, has been between one not a party to, but who assisted in the prosecution or defense of the prior suit, and the adverse party in that suit.

In *Stoddard vs. Thompson*, 31 Iowa, 80, the material facts briefly stated, were as follows: Thompson having wrongfully obtained possession of a note belonging to Stoddard, made by one Wilson, and commenced suit against Wilson for its collection, Stoddard employed counsel to defend the action, agreed with Wilson to pay the cost of defending, and was a witness in the case. The defense set up was that Stoddard, and not Thompson, was the owner of the note. Judgment on this issue was rendered in favor of Thompson. Stoddard subsequently commenced the suit, the decision in which is here cited, against Thompson and others, to enjoin the collection by Thompson of the Wilson judgment and certain other notes obtained by him of Stoddard at the same time and under the same circumstances that the Wilson note was obtained. He was held entitled to relief asked as to the notes, but not as to the judgment. The court, in the opinion, page 82, referring to the issue as to the ownership of the Wilson note made in the former suit, say:

> The issue thus made was determined in favor of Thompson, and plaintiff, Stoddard, *though not a party to the suit*, is bound by the adjudication. One who, *though not a party*, defends or prosecutes an action *by employing counsel, paying costs, and by doing those things which are usually done by a party*, is bound by the judgment rendered therein.

This, it will be seen, was a case in which there was not and could not have been any question of privity or liability over. The subsequent suit was not, as in most of the cases, between the parties who had *a common* interest in the prior suit.

It is not the fact of the privity of the parties to the subsequent suit, with respect to the subject matter of the prior one that makes the adjudication binding, but the fact of interest, notice and actually taking part, or having opportunity to do so, in the prosecution or defense of the former suit.

In *Tarleton vs. Johnson*, 25 Alabama, 300, upon a full review of the authorities, it was held that parol evidence is admissible to show who were real parties in interest in an action, and that the judgment in an action may be conclusive as against persons connected therewith, by parol, as "*real* defendants, although they were not parties to the record."

In Freeman on Judgments, sections 174 and 175, it is said:

> Neither the benefit of judgments on the one side, nor their obligations on the other, are limited exclusively to parties and their privies, or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons *on whose behalf* and *under whose direction* the suit is prosecuted or defended, in the name of some other person. * * * For the purpose of showing that parties not named in the record were the real parties in interest, and conducted the suit in the name of others who were only nominal parties, parol evidence may always be offered, and when the showing is made, the real parties are concluded by the judgment.

*Barney vs. Dewey*, 13 Johns, 224, was an action for damages for fraud in the sale of a horse by Dewey to Barney which belonged to a third party, whose name also was Dewey, and who had previously recovered the value of the horse in an action against Barney. The defendant in the last action was a witness on behalf of plaintiff in the first one, and the adjudication in the first was plead as a defense in the last. In the opinion of the court, page 225, it is said:

> There is no allegation of notice to the defendant of the pendency of the suit brought by Thadeus Dewey, but there is an averment of a fact tantamount. It is alleged that the defendant was a witness on that trial, and proved, himself, that he did not own the horse when he sold him to the plaintiff.

If Mrs. Litchfield was a "real defendant," though not "a party to the record," the dependence of the defense of prior adjudication upon the question whether she was or not, makes that question, as above claimed, a federal question.

In *Mackay vs. Dillon*, 4 Howard, 421, it is said that when it is sought to give effect to evidence, "for purposes which involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed in a similar manner as if a like question had arisen in a supreme court of error of a state when reviewing the proceedings of inferior courts of original jurisdiction."

And in *Kennedy's Executors vs. Hunt's Lessee*, 7 Howard, 586, involving a congressional grant, and the question being as to whether or not a ruling of the state court rejecting evidence of a certain survey of the grant raised a federal question, the court, on page 594, held that it did not, but for the reason that "it could not change the grant nor affect its validity in any degree."

The same rule must apply for the same reason whenever, in any similar case, it is sought to give effect to any fact or question "for purposes which involve questions giving this court jurisdiction."

II.

Does the question, whether or not the decision of this court, in the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, was a final determination of the question of title, as between the claimants under the railroad and river land grants, respectively, and the decision of the supreme court of Iowa, holding it not to have been, and thereby defeating the defense of the New York statute of limitations, present a federal question; and if so, was the decision of the supreme court of Iowa holding the decision in question not to have been such final determination, erroneous?

Since by the terms of the act of congress the right to the writ of error exists whenever an "immunity is claimed under authority exercised under the United States, and the decision is against the immunity claimed;" and as, in the language of the opinion of this court in *Murdock vs. City of Memphis*, 20 Wall., page 632: "It was no doubt the purpose of congress to secure to every litigant whose rights depended *on any question of federal law*, that the question should be decided for him by the highest federal tribunal"—in the contingency of an adverse decision by the state court, it seems plain enough that this case, on the remaining question, comes within both the terms and purpose of the law. Certain it is, from the certificate, that the claim of immunity under the defense of the statute of limitataions depended directly and absolutely on the effect to be given the former decision of this court in the Wolcott case; and it is equally certain the state court given to the decision in the Wolcott case the effect hatt, had claimed for it by the plaintiff in error, the result would have been the immunity claimed.

The question upon which, in the Stryker case, referred to in the statement, the defense of the statute of limitations turned, was, whether the cause of action accrued at the dates of the respective payments of the taxes, or when the question of title was finally determined by the decision of this court, as between the claimants respectively, under the so-called river land and railroad grants; and, if at the date of the final decision of that question, whether or not the decision in the cases of Wolcott and Burr, 5 Wall., *supra*, was such final determination. How the question assumed that form is shown by the extract from the opinion in the case, copied into the statement.

The court having thus in effect made the question of defendant's liability to depend upon the time of "the termination of the litigation by which the title was adjudicated to be in defendant," the ultimate and precise question as shown by the certificate, as above quoted, upon which the case and defendant's

liability turned, was, whether or not the decision of this court in the cases of Wolcott and Burr was a final adjudication of the question of title therein passed upon; in other words, *upon the effect to be given to a decision of this court.* While, in terms and immediately, immunity was claimed under the statute of limitations, yet the ultimate and essential ground upon which the claim must be allowed, if at all, was that, according to the true interpretation and effect of the decision in the cases just named, a cause of action thereby and of that date accrued to the defendant in error.

Can it make any difference how the question of immunity comes to depend on a question of federal law, provided only that it comes legitimately before the court, and does necessarily so depend?

Plaintiff in error maintained that the decision in these cases was a final determination of the question, while the court held that the question was not finally decided until 1873, meaning in the cases of *Williams vs. Baker*, 17 Wall., 144, and *Homestead Company vs. Valley Railroad*, *Id.*, 153, and, *because of so holding*, *necesarily* further held, that the action was not barred. From the contrary holding it would have *as necessarily* followed that the actionwas barred. There was no question requiring a construction in any respect of the New York statute of limitations, nor was its application to the case dependent upon any controverted fact proposition. The real and only question, therefore, was, whether or not the decision of this court in the Wolcott and Burr cases was *final* in such sense as that, according to the rule or doctrine laid down by the supreme court of Iowa, a cause of action then accrued. That decision was made in cases to which, by intervention, the assignor of defendant in error was a party, as will be seen by reference to the record (89–99). That the homestead company must be treated as having been a party to the Wolcott and Burr cases for the

purposes of this question, is further evident from the following taken from the opinion of this court in *Williams vs. Baker*, 17 Wall., 144, referring to a complaint of collusion between the parties in the Wolcott and Burr cases, and the claim that for that reason it should not be treated as an authoritative adjudication. On pages 150–2, the court says:

> We must be permitted to question both the taste and legal competency of testimony offered in an inferior court to show that a decision in this court was obtained by fraudulent devices, *when that decision is not relied on as evidence of any fact or pleaded as an estoppel, but merely because it may be referred to as settling a principle of law applicable to the case at bar.*
>
> There is in the record of that case, as it remains in this court, sufficient answer to this objection to the opinion *as an authority on the law in this case.* The writer of this opinion, though then a member of the court, declined to take any part in its decision because he had been of counsel for the navigation company in a general way, and did not know how far he might have been engaged in that case. But when it was submitted on printed arguments on both sides he saw at once that the legal propositions involved did affect materially the title of several railroad companies in Iowa to the lands in question, and he felt it to be his duty to call the attention of those of his brethren who must decide the case to that fact. On this suggestion an order was made that those companies be notified of the pendency of that suit, with liberty to intervene and be heard on the question in which they were interested. They did intervene, the case was postponed for over a year, and several arguments were submitted in favor of the railroad companies by able counsel *on the very question now under consideration*, and an order was made inviting all parties interested to do so. It was after a full consideration of all these arguments that the decision was made. But there was an additional security that the court would carefully consider the question, in the fact that there was submitted at the same time the case of *Burr vs. the Des Moines Navigation & Railroad Company*, on a similar warranty of title. Now, though both suits were decided in the circuit court for the southern district of New York, they were decided by different judges, and the decisions were in conflict. This of itself would demand of the court a careful consideration of the point of difference which was the very point now under consideration. * * *
>
> Whatever, therefore, may have been the design of the original parties to the suit of *Wolcott vs. the Des Moines Company*, it is clear that the question here involved was argued fully by parties deeply interested on both sides, and received the attentive consideration of the court, and as an authoritative exposition of its views is entitled to the same weight as other well considered cases.

Further and conclusive evidence that the question for decision, and the land, the title to which was in controversy, was the same in the two cases will be found by a comparison of descriptions and a reference to the charge of Judge Shipman to the jury in the Burr case, and the argument of Platt Smith on behalf of the Dubuque & Sioux City R. R. Co. intervenor, in the Wolcott case. The identity of the lands will be seen from the description of those involved in the homestead company case (27) embracing all of the *odd* numbered sections in townships 88 and 89 north, of range 27 and 28 west, and all of the lands involved in the Wolcott and Burr cases (100) being in *odd* numnumbered sections, in these *same* townships and ranges; while the identity of the questions is clearly shown by the argument of Platt Smith (100 and 101).

The Wolcott-Burr decision has repeatedly been reaffirmed, and the court in *Homestead Company vs. Valley Railroad*, 17 Wall., on page 162, thus refers to it:

> The main question involved in this case is the question of the title to the Des Moines river lands, which was *settled* several years ago by the decision in the cases of Wolcott and Burr, and in the subsequent unreported case of *Riley vs. Wells*, adversely to the titles set up by the appellants. At the present term of this court the principles involved in these decisions have been reconsidered and reaffirmed.

In *Litchfield vs. the County of Webster*, 101 U. S., it is said on page 777, referring to the conflicting claims under the railroad and riverland grants, respectively, and to the fact of the lands having been claimed by the state under the former grant, it is said:

> This claim on the part of the state was maintained and constantly asserted adversly to Litchfield, until the case of *Wolcott vs. Des Moines Company*, 5 Wallace, 681, was decided in this court at the December term, 1866. *That decision settled the dispute as to these lands.*

Is the decision of the state court as to the proper interpretation and effect of the decision of this court, in *Homestead Company vs. Valley Railroad*, a "federal question" within the meaning of the act of congress.

It is respectfully submitted that upon this point the case is within the principle of the following decisions of this court: *Dupasseur vs. Rochereau*, 21 Wall., 130, in which on error to the supreme court of Louisiana, this court took and exercised jurisdiction to determine whether or not, upon a question of the order of priority of liens, the decree of the state court foreclosing a mortgage, accorded due force and effect to a decree previously rendered in the United States circuit court for that state foreclosing another mortgage on the same premises; and *Embry us. Palmer*, 2 Supreme Court Reporter, 25, in which it was held that this court might, on error, review the judgment of the Supreme Court of Connecticut enjoining the collection of a judgment rendered by the Supreme Court of the District of Columbia.

The decree of the federal court—which it was claimed in the first named case had not been given its due legal effect—it will be observed, was rendered in a case to which Rochereau, against whom the question was made, was not a party. Yet this court took jurisdiction and affirmed the decision of the state court *because it had given due effect to the decision of the federal court.* The state court could not have certified more certainly than it has in the case at bar that its decision was against the immunity claimed *because of the limited effect allowed by it to the Wolcott decision.* Suppose the defense of the statute of limitations, the case in all other respects being the same, had, instead of turning upon a decision of this court, turned upon the meaning and effect to be given to an act of congress, would the question in legal effect have been different? And yet is it not clear that it would have been a federal question.

*Crescent Live Stock Co. vs. Butchers' Union*, 120 U. S., 143, holds as follows:

> The judgments and decrees of the circuit court of the United States setting in a particular state are to be accorded in the courts of that state, whether as the foundation of an action or of a defense, either by plea, or in proof such effect, and such effect only, as would be accorded in similar

circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by such court to a judgment or decree of court of the United States. is a federal question within the jurisdiction of this court on a writ of error to the supreme court of the state.

In the opinion on page 146, it is said;

It is argued by counsel for the defendant in error that this does not embrace any federal question that the effect to be given to a judgment or a decree of the supreme court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana or by some principle of general law as to which the decision of the state court is final, and that the ruling in question did not deprive the plaintiff in error of any privilege or immunity specially set up or claimed under the constitution or laws of the United States. But this is an error. The question whether a state court has given due effect to a judgment of the court of the United States, is a question arising under the constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process.

In *Factors & Traders Insurance Company vs. Murphy*, 111 U. S., 738, it was held, that this court had jurisdiction because the controversy in the case related to the effect to be given to a sale under an order of the district court of the United States.

While in terms the certificate states the question to have been whether or not the decision in the Wolcott case was a *final* decision of the question of title, it is obvious that it could only have been, whether or not upon the theory of that court as to the nature of the implied promise and the condition upon which a suit could be brought, it was such a decision of the question as gave to the defendant in error an immediate right of action upon it.

The defendant in error having been a party in such sense and manner as to be concluded by the adjudication, the decision was necessarily final, unless and until in some manner reviewed and set aside by this court, of which having been done there is no pretense. The supreme court of Iowa must therefore necessarily have held that the question of title was not one of the questions decided in the Walcott and Burr cases, as otherwise it must necessarily have held a cause of action to have then

accrued and to have been barred long before the commencement of this suit. The question therefore in reality was, whether or not the question of title was decided, and not as to its being or not being final. How long must the defendant in error have waited to find out whether or not the decision was final and gave it a right of action? Was it to wait until the commencement of another action, and if such action had never been commenced would the decision have never become final?

C. H. GATCH AND
WILLIAM CONNOR,
*Attorneys for Plaintiff in Error.*

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# ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

IN THE

## SUPREME COURT OF THE UNITED STATES.

EDWIN C. LITCHFIELD, ADMINISTRATOR OF GRACE H. LITCHFIELD, DECEASED, PLAINTIFF IN ERROR,

*vs.*

EDWARD K. GOODNOW, DEFENDANT IN ERROR.

ON ERROR FROM THE SUPREME COURT OF IOWA.

C. H. GATCH, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

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C. H. GATCH AND
WILLIAM CONNOR,
*Attorneys for Plaintiff in Error.*

# Argument in Resistance of Motion to Quash Writ of Error.

IN THE

## Supreme Court of the United States.

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EDWARD K. GOODNOW, *Defendant in Error*.

*On Error from Supreme Court of Iowa.*

C. H. GATCH, *for Plaintiff in Error*.

GEO. CRANE, *for Defendant in Error*.

## ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

### STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation and Railroad Company, another Iowa corporation, and numerous grantees of the latter — including, in fact, as is claimed by plaintiff in error, his intestate, although she was not named as a party in the record — to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantors in contract, since 1861. They have paid the taxes thereon to the state of Iowa since, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded since 1861, by the holder of the legal title who has not paid them. Record, p. 25.

And prayed—

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation & Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon. Record, p. 26.

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed save by the said complainants said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is and has been unauthorized and wrongful.

The suit having, as stated, been commenced in the district court of Webster county was remanded to the United States circuit court and, as stated by counsel for defendant in error in his brief—

In due course of litigation this court affirmed the decree of the United States circuit court for Iowa establishing title to the lands in the Des Moines Navigation and Railroad Company, and its several grantees, and denying the right of the homestead company to recover the taxes paid.

On the question of complainant's right to the alternative relief claimed, this court say in *Homestead Company vs. Valley Railroad*, 17 Wall., p. 167:

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked

too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily refunded by the successful party in this suit.

As it is conceded by counsel for defendant in error in his brief, that this adjudication was plead in this case as a defense, it will not be necessary to set out the portion of the record showing that fact.

In the case of *Goodnow vs. Moulton*, 57 Ia., 555, prosecuted by Goodnow as assignee of the Homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad*, having been cited as authority, the Supreme Court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show, with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, in the subsequent case of *Goodnow vs. Stryker*, 14 N. W. Reporter, 345, now also pending here on a motion similar to this, after having discovered the oversight in the Moulton case, it is said:

> Since the decision in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*.

The question of voluntary payment having been thus disposed of, it became necessary in that case to dispose of the further defense relied on, that the claim was barred by the New York statute of limitations, and this involved the real and decisive question, *when* and *how* did the cause of action accrue, which the opinion thus discusses and determines.

> We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which the action is based, arose by reason of the circumstances. See *Goodnow vs. Moulton*, above cited. One very impor-

tant circumstance was that the title was involved in serious litigation which was not terminated in the defendant's favor until 1873. We do not think the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should be adjudicated to be in the Iowa Homestead Company, and no one had any reason to suppose he intended to incur any such liability. The most that can be said then in regard to the defendant's implied promise is, that it was based upon a contingency, and being so, it was not enforcible until the contingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant.

Plaintiff in error accepting this as settling the proposition that a cause of action accrued to the homestead company by "the termination of the litigation by which the title was adjudicated to be in the defendant," the Des Moines Navigation & Railroad Company, plead as one of its defenses in this case, the New York statute of limitations, of which state the intestate was a citizen, relying on the decision of this court in the cases of *Wolcott vs. The Des Moines Company*, and *The Des Moines Company vs. Burr*, 5 Wall., 681 and 689, as being such termination of that litigation. For answer, setting up this defense—see record, page 6—and for the evidence showing the intervention of the homestead company in the two last named cases—see record, pp. 88–101.

This suit having been commenced against Grace H. Litchfield in her life time, was, after her death, revived against the plaintiff in error as her administrator.

Grace H. Litchfield was not named in the record as a party to the homestead company suit, in which the prior adjudication relied on as a defense was had, but plaintiff in error maintains that she was in fact a party in such sense as to have been entitled to the benefit of the adjudication, and to have been bound by it, had the same been adverse to her interest. It is admitted, record, page 24, that the lands on which the taxes in question were paid, were embraced in the lands, the title to which were in question in that suit, and the taxes—the recovery of which was also claimed therein, in the event of the

question of title being determined adversely to the homestead company—were *all* of the taxes paid on *all* of the lands, the title to which was in question; and it is shown by the deposition of John Brown—record, page 105—that he had been the agent of Grace H. Litchfield ever since the summer of 1866; and that as such agent, it was his business to sell and pay taxes on her Iowa lands; "to attend to all matters of litigation in this state, affecting the land of defendant in any manner"—that he accepted service for the defendants, of the original notice, in this homestead company case; that during the pendency of the suit, he had charge, as agent, "of the interests of nearly all of the non-resident owners, *including those of the defendant;* * * * retained counsel and paid all of the expenses and fees to counsel incurred by the litigation;" that "defendant's lands were protected," by him, "as her agent, as were the lands of all the other non-residents, who had derived title from the Des Moines Navigation & R. R. Co.," for whom he was agent; that "to pay expenses and counsel fees," he "assessed the non-resident owners, *including the defendant* and her husband, *according to their interest in the land involved in the controversy;*" that "the *defendant's portion of the assessment* was included in charges made in" his "accounts with the defendant's husband, amounting in all to about $1,400," and that "these charges were made *with the knowledge and consent of defendant* and her husband."

The following is the certificate, which, together with the foregoing and the copy of the decree of the Supreme Court of Iowa, will constitute a sufficient statement of the case and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the Supreme Court of Iowa in other similar cases:

## CERTIFICATE.

And now on the application of the defendant, Edwin C. Litchfield, administrator of Grace H. Litchfield, deceased, it is certified by the court

here, and ordered to be made part of the record herein, that by the answer of defendant, in defendant's assignment of errors in the additional abstract, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that, as was claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company, by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation & Railroad Company*, this defendant and others, at the October term thereof, A. D. 1872, to which case it was claimed that said Grace H. Litchfield, though not named as such in the record, was a party defendant in such sense as to have been bound by and entitled to the benefits of the adjudication therein, and that our decision herein was and is against the immunity so claimed.

And it is further certified and ordered to be made part of the record herein, that by defendant's answer and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed, the alleged cause of action not having accrued within six years immediately preceeding the commencement of the action, was barred by the New York statute of limitations, and that to determine whether or not it was so barred it became material and necessary to decide whether or not the decision of the Supreme Court of the United States, in the case of *Samuel G. Wolcott vs. The Des Moines Navigation & Railroad Company*, was a final determination of the question therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decesion was not a final determination of said question and was and is against the immunity so claimed because of our said decision that said determination was not final.

## DECREE.

This cause coming on for final hearing, Edward K. Goodnow, appearing by George Crane, his attorney, the said Edwin C. Litchfield, administrator of the estate of Grace H. Litchfield, deceased, appearing by C. H. Gatch, his attorney, and the court having duly considered the evidence, the issues and the argument of counsel, finds that the plaintiff is entitled to recover the principal sums shown to have been paid by plaintiff's assignor, and interest thereon at the rate of six per cent. per annum from the time such payments were made, and that plaintiff is entitled to a lien upon the land described in the petition to secure the payment of the sums recovered.

It is therefore ordered and decreed that the plaintiff have, and recover of, and from the defendant, Edwin C. Litchfield, as administrator of the estate of Grace H. Litchfield, deceased, the sum of six thousand one hundred and thirty-six and 37–100 dollars, and interest thereon at the rate of

six per cent. per annum from the 13th day of March, 1883, and costs of suit taxed at ———— dollars.

And this decree is hereby made a special lien on the following described land from April 28, 1873, to-wit:

It is further ordered, that a special execution be issued; and that said lands, or so much thereof as may be necessary, be sold thereunder according to the provisions of law, and the proceeds of such sale be applied in payment of this decree.

## ARGUMENT.

The record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the Supreme Court of Iowa:

*First.*—Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

*Second.*—The plaintiff in error claimed immunity from the demand of the defendant in error, because *by force and virtue of the decision of this court* in the case of *Wolcott vs. Des Moines Co.*, 5 Wall., 681, and the *Des Moines Co. vs. Burr. Id.*, 689, the cause of action accrued, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the statute of limitations of the state of New York.

The decision of this question, and the necessity therefor, by the Supreme Court of Iowa, are thus stated in the certificate found on page 126 of the original record:

> To determine whether or not it was so bound, it became necessary to decide whether or not the decision of the Supreme Court of the United States in the case of *Samuel G. Wolcott vs. the Des Moines Navigation and Railroad Company was a final determination of the question therein decided.* * * * And our decision herein was and is that said

decision was not a final determination of said question, and was and is against the immunity so claimed *because of our said decision that said determination was not final.*

I.

If Grace H. Litchfield was a party to the homestead company case in such sense that she might claim the benefit of the adjudication, then it will not be denied that the claim of immunity thereunder involves a federal question of which this court has jurisdiction.

Was she a party in such sense?

Her lands were included among those to which the complainant company sought to establish title in itself. The $80,000 of taxes paid by the company, for repayment of which as alternative relief a decree was asked, included the taxes paid on her land. She elected, as she might, but was not bound to do, to unite with those who were made defendants of record in the case, in resisting both of these demands. She having thus, in fact, had a *contention* with the complainant as really and as *effectively* as if she had been a defendant of record, would she have been bound by an adverse result?

The question is not whether judgment could have been entered up against her in that case, but whether had the company, in that event of the suit, thereupon commenced precisely the same character of suit against her as to her lands and her share of the taxes only, she could have been heard to say that she had not already had her "day in court."

If Grace H. Litchfield was in such sense a party as to be bound by the judgment, it can make no difference that the question whether or not she was such party is not a federal question. Plaintiff in error cannot be deprived of the immunity of his intestate as a party because the fact that she was also a party, was shown by other than the usual record evidence, and a question of law was raised as to whether or not the evidence relied on was sufficient.

In *Chicago vs. Robbins*, 4 Wallace, 657, this court, on page 674, stating the rule generally as to when persons other than parties of record are bound by the adjudication, say:

> Persons notified of the pendency of a suit in which they are directly interested, must exercise reasonable diligence in protecting their interest, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced.

In *Conger vs. Chilcote*, 42 Iowa, 18, it was held that—

> One who is benefited by the prosecution of an action of which he has notice, is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment rendered.

And that—

> No particular form of notice is required, and it may be given, either orally or in writing.

The first of these propositions having been in substance held by the court below in an instruction to the jury, the Supreme Court, on pages 23–4, say:

> The instruction clearly announces the rule, that in order to hold defendant so bound, he must be found to have been a party in interest. In such case he would be bound, though his name were not used as a party to the action. We understand the instruction, so far, to mean this: If the action was prosecuted *in whole or in part for defendant's benefit*, if he were to share in the fruits of the judgment, he is to be regarded as a party in interest, and in that case is bound by the judgment rendered therein. We think there can be no doubt of the correctness of the rule. If he had such an interest in the matter involved in the action, and entrusted it to the Mt. Pleasant bank for settlement by suit, he will be estopped to deny the matters adjudicated therein.

It was claimed in argument in the state court that it is only when persons not parties of record are in privity with those who are, that the adjudication can be binding upon them or inure to their benefit. If one not a party is bound by the adjudication as between himself and the party with whom he had a common interest, and was in privity, and whom he, therefore, assisted, or had opportunity to assist, why should he

not also be bound if the subsequent suit is between himself and the common adversary in the former suit? If in the former case he is bound because of his interest in the subject matter of the litigation, and his opportunity to be heard, why should he not for the same reasons be bound in the latter case? Mrs. Litchfield was not simply interested in the questions of law involved in the homestead company suit—the title to her land and, alternatively, her share of the taxes paid, were claimed in the same manner and terms as were the title and shares of the defendants named in the bill, and she was thereby led to assist in the defense of the suit,—was, in fact, represented by counsel employed by her agent, and contributed *her proportionate share* of the expenses of the litigation.

While the question has most frequently arisen between parties and those who on account of privity were liable over to them, cases are not wanting in which the subsequent litigation, as in this case, has been between one not a party to, but who assisted in the prosecution or defense of the prior suit, and the adverse party in that suit.

In *Stoddard vs. Thompson*, 31 Iowa, 80, the material facts, briefly stated, were as follows: Thompson having wrongfully obtained possession of a note belonging to Stoddard, made by one Wilson, and commenced suit against Wilson for its collection, Stoddard employed counsel to defend the action, agreed with Wilson to pay the cost of defending, and was a witness in the case. The defense set up was that Stoddard, and not Thompson, was the owner of the note. Judgment on this issue was rendered in favor of Thompson. Stoddard subsequently commenced the suit, the decision in which is here cited, against Thompson and others, to enjoin the collection by Thompson of the Wilson judgment and certain other notes obtained by him of Stoddard at the same time and under the same circumstances that the Wilson note was obtained. He was held entitled to relief asked as to the notes, but not as to the judgment. The court, in the opinion, page 82, referring

to the issue as to the ownership of the Wilson note made in the former suit, say :

> The issue thus made was determined in favor of Thompson, and plaintiff, Stoddard, *though not a party to the suit*, is bound by the adjudication. One who, *though not a party*, defends or prosecutes an action *by employing counsel, paying costs, and by doing those things which are usually done by a party*, is bound by the judgment rendered therein.

This, it will be seen, was a case in which there was not and could not have been any question of privity or liability over. The subsequent suit was not, as in most of the cases, between the parties who had *a common* interest in the prior suit.

It is not the fact of the privity of the parties to the subsequent suit, with respect to the subject matter of the prior one that makes the adjudication binding, but the fact of interest, notice and actually taking part, or having opportunity to do so, in the prosecution or defense of the former suit.

If, as seems to be well settled, parol evidence is admissible to show what was the matter or issue tried in a former suit, the judgment in which is offered in evidence in a subsequent suit, when that fact does not appear from the record—see *King vs. Chase*, 15 N. H., 9, and *Miles vs. Caldwell*, 2 Wall., 35—it ought to be admissible to show also by parol who of the parties in interest were *actual contestants* in a former suit, the judgment in which is offered in evidence in a subsequent suit, where the names of any of them are not shown by the record.

II.

The question upon which, in the Stryker case, referred to in the statement, the defense of the statute of limitations turned, was, whether the cause of action accrued at the dates of the respective payments of the taxes, or when the question of title was finally determined by the decision of this court as between the claimants respectively, under the so-called river land and railroad grants, and, if at the date of the final decision of that question, whether or not the decision in the cases of

Wolcott and Burr, 5 Wall. *supra*, was such final determination. How the question assumed that form is shown by the extract from the opinion in the case, copied into the foregoing statement.

The court having thus in effect made the question of defendant's liability to depend upon the time of "the termination of the litigation by which the title was adjudicated to be in defendant," the ultimate and precise question as shown by the certificate, as above quoted, upon which the case and defendant's liability turned was, whether or not the decision of this court in the cases of Wolcott and Burr was a final adjudication of the question of title therein passed upon; in other words, upon the effect to be given to a decision of this court. While, in terms and immediately, immunity was claimed under the statute of limitations, yet the ultimate and essential ground upon which the claim must be allowed, if at all, was that, according to the true interpretation and effect of the decision in the cases just named, a cause of action thereby and of that date accrued to the defendant in error.

Plaintiff in error maintained that the decision in these cases was final, while the court held that the question was not finally decided until 1873, meaning in the cases of *Williams vs. Baker*, 17 Wall., 144, and *Homestead Company vs. Valley Railroad*, *Id.*, 153, and, so holding, necessarily held that the action was not barred. From the contrary holding it would have as necessarily followed that the action was barred. There was no question requiring a construction in any respect of the New York statute of limitations, nor was its application to the case dependent upon any controverted fact proposition. The real and only question, therefore, was, whether or not the decision of this court in the Wolcott and Burr cases was *final* in such sense as that, according to the rule or doctrine laid down by the Supreme Court of Iowa, a cause of action then accrued. That decision was made in cases to which, by intervention, the assignor of defendant in error was a party, as will

be seen by reference to the record, pages 88–100. That the homestead company must be treated as having been a party to the Wolcott and Burr cases for the purposes of this question, is further evident from the following taken from the opinion of this court in *Williams vs. Baker*, 17 Wall., 144, referring to a complaint of collusion between the parties in the Wolcott and Burr cases, and the claim that for that reason it should not be treated as an authoritative adjudication. On pages 150–2, the court says:

> We must be permitted to question both the taste and legal competency of testimony offered in an inferior court to show that a decision in this court was obtained by fraudulent devices, *when that decision is not relied on as evidence of any fact or pleaded as an estopple, but merely because it may be referred to as settling a principle of law applicable to the case at bar.*
>
> There is in the record of that case as it remains in this court sufficient answer to this objection to the opinion *as an authority on the law in this case*. The writer of this opinion, though then a member of the court, declined to take any part in its decision because he had been of counsel for the navigation company in a general way, and did not know how far he might have been engaged in that case. But when it was submitted on printed arguments on both sides he saw at once that the legal propositions involved did affect materially the title of several railroad companies in Iowa to the lands in question, and he felt it to be his duty to call the attention of those of his brethren who must decide the case to that fact. On this suggestion an order was made that those companies be notified of the pendency of that suit, with liberty to intervene and be heard on the question in which they were interested. They did intervene, the case was postponed for over a year, and several arguments were submitted in favor of the railroad companies by able counsel *on the very question now under consideration*, and an order was made inviting all parties interested to do so. It was after a full consideration of all these arguments that the decision was made. But there was an additional security that the court would carefully consider the question, in the fact that there was submitted at the same time the case of *Burr vs. The Des Moines Navigation & Railroad Company*, on a similar warranty of title. Now, though both suits were decided in the circuit court for the southern district of New York, they were decided by different judges, and the decisions were in conflict. This of itself would demand of the court a careful consideration of the point of difference which was the very point now under consideration. * * *
>
> Whatever, therefore, may have been the design of the original parties to the suit of *Wolcott vs. The Des Moines Company*, it is clear that the

question here involved was argued fully by parties deeply interested on both sides, and received the attentive consideration of the court, and as an authoritative exposition of its views is entitled to the same weight as other well considered cases.

The Wolcott–Burr decision has repeatedly been reaffirmed, and the court in *Homestead Company vs. Valley Railroad*, 17 Wall., on page 162, thus refers to it:

> The main question involved in this case is the question of the title to the Des Moines river lands which was *settled* several years ago by the decision in the cases of Wolcott and Burr and in the subsequent and unreported case of *Riley vs. Wells* adversely to the title set up by the appellants. At the present term of this court the principles involved in these decisions have been reconsidered and reaffirmed.

The question here is, whether, upon the question whether or not the decision in the Wolcott and Burr cases was such final determination of the question of title, as that a cause of action then accrued, the decision of the state court is final, or whether, being a question as to the proper interpretation and effect of a decision of this court, it is a "federal question" within the meaning of the act of congress.

It is respectfully submitted that upon this point the case is within the principle of the following decisions of this court: *Dupasseur vs. Rochereau*, 21 Wall., 130, in which on error to the Supreme Court of Louisiana this court took and exercised jurisdiction to determine whether or not, upon a question of the order of priority of liens, the decree of the state court foreclosing a mortgage, accorded due force and effect to a decree previously rendered in the United States circuit court for that state foreclosing another mortgage on the same premises; and in *Embry vs. Palmer*, 2 Supreme Court Reporter, 25, in which it was held that this court might, on error, review the judgment of the Supreme Court of Connecticut enjoining the collection of a judgment rendered by the Supreme Court of the District of Columbia.

While in terms the certificate states the question to have been whether or not the decision in the Wolcott case was a

*final* decision of the question of title, it is obvious that it could only have been, whether or not, upon the theory of that court as to the nature of the implied promise and the condition upon which a suit could be brought, it was such a decision of the question as gave to the defendant in error an immediate right of action upon it.

The defendant in error having been a party in such sense and manner, certainly, as to be concluded by the adjudication, the decision was necessarily final, unless and until in some manner reviewed and set aside by this court, of which having been done there is no pretense. The Supreme Court of Iowa must therefore necessarily have held that the question of title was not one of the questions decided in the Wolcott and Burr cases, as otherwise it must necessarily have held a cause of action to have then accrued and to have been barred long before the commencement of this suit. The question therefore in reality was, whether or not the question of title was decided, and not as to its being or not being final. How long must the defendant in error have waited to find out whether or not the decision was final and gave it a right of action? Was it to wait until the commencement of another action, and if such action had never been commenced would the decision have never become final? Truly, error is the most prolific of mothers. What a brood has come of the original one of taking a devious by-way in the case of *Goodnow vs. Moulton*, *supra*, instead of following the plain and century beaten pathway of *Homestead Company vs. Valley Railroad*, *supra*, and *Garrigan vs. Knight*, 47 Iowa, 525, with respect to the law of *voluntary* payments.

C. H. GATCH,
*Attorney for Plaintiff in Error.*

103-534

SUPREME COURT U. S.
FILED
OCT 20 1884
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1884.

NO. ~~962~~ 414

EDWIN C. LITCHFIELD, Adm'r of GRACE H. LITCHFIELD, Dec. *Plaintiff in Error.*
vs.
EDWIN K. GOODNOW, *Defendant in Error.*

On Error from Supreme Court of Iowa.

*Reply to Plaintiff's Argument on Motion to Dismiss Writ of Error.*

C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

## DEFENDANT'S BRIEF.

# SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1884.

## NO. 962.

EDWIN C. LITCHFIELD, Adm'r of GRACE H. LITCHFIELD, Dec. *Plaintiff in Error.*

vs.

EDWIN K. GOODNOW, *Defendant in Error.*

On Error from Supreme Court of Iowa.

C. H. GATCH, for Plaintiff in Error.

GEORGE CRANE, for Defendant in Error.

## *Reply to Plaintiff's Argument on Motion to Dismiss Writ of Error.*

I.

The adverse counsel claims that Mrs. Litchfield was in effect a party to the Homestsad suit simply because

1st. Her lands were discribed in the petition.

2nd. The plaintiffs alleged in the petition the payment by them of all the taxes assessed upon all the lands, and

3rd. She contributed her share of attorney's fees for defending the suit, There is nothing else referred to as connecting her with the case, that these are wholly insufficient, cannot be doubted.

She paid her share of the expenses simply because she was interested in similar question of law and fact. She had no interest in the Homestead suit, either as party or privy and neither her rights or liability could have been adjudicated therein.

To have recovered as against her in that suit, it would have been necessary to prove her ownership of the lands and the payment of the taxes thereon. As the pleadings stood evidence of these essential facts would have been entirely inadmissable. None of the defendants were liable for her taxes, and hence they would have excluded all evidence pertaining thereto.

Judgments against the defendants of record would have been against them for their taxes and not for hers. In fact no judgment could have been rendered against her in the suit. It is a principle of law that there is no estoppel unless it is mutual in its operation.

II.

Another ground on which plaintiff in error claims jurisdiction for this court is that the state court held that the decision in the Wolcott and Burr cases in 5 Wall. 581 was not such a final determination of the rights of the Homestead company to the so called Des Moines river lands, as to cause the statute of limitations to begin to operate at that date. It was insisted by the plaintiff in error that after the decision in those cases, the litigation by the Homestead company was carried on in bad faith, and that the payment of taxes thereafter was officious and that therefore the cause of action, if any existed, accrued at that time.

Of course this simply raised a question as to the proper construction to be given to the statute of limitations of the state of Iowa, and not as to the effect that was to be given to the judgments in those cases. To apply the bar of this statute, the court was required to determine how and at what time the cause of action accrued. In determining this question, the state court decided a matter of local and not of federal cognizance.

It is true that a refusal by a state court to give effect to a federal judgment, raises a federal question. But the only effect of the judgments In the Wolcott and Burr cases was to settle the title to the lands involved in those cases. The Homestead

company never had or even claimed to have any interest in those suits or in the lands in controversy therein. Hence there can be no pretense that full and complete effect was not given to the judgments in those cases. In the case at bar the state court was in no sense called upon to give effect to said judgments, and hence a refusal to do so was not in any manner possible. The question presented for the determination of the state court was whether the cause of action accrued when the decision in the Wolcott and Burr cases was rendered, or when the opinion of this court was delivered in the Iowa Homestead suit, which was the termination of all *bona fide* litigation about the title to the lands. When a cause of action accrues under the statutes of Iowa, or when the statute of limitation begins to run is necessarily a question for the determination of the state and not of the federal courts.

Whether the litigation was carried on in good faith after the decision in those cases or not is a matter dependent upon general law, and to no extent raises a federal question. All of which is respectfully submitted.

GEORGE CRANE,

Attorney for Defendant in Error.

No 44

No 962

See page 9 th 11 of Argt
Motion in case 43 + argt in 356

IN SUPREME COURT OF THE UNITED STATES.

EDWIN C. LITCHFIELD ADM'R., of
GRACE H. LITCHFIELD, *Plaintiff in Error.*
vs.
EDWARD K. GOODNOW, *defendant in Error.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

**On Motion to Dismiss Writ of Error or affirm Judgment.**

C. H. GATCH, for Plaintiff in Error.
GEO. CRANE, for Defendant in Error

# DEFENDANT'S BRIEF.

# IN SUPREME COURT OF THE UNITED STATES.

EDWIN C. LITCHFIELD ADM'R., of
GRACE H. LITCHFIELD, *Plaintiff in Error.*
vs.
EDWARD K. GOODNOW, *defendant in Error.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

C. H. GATCH, for Plaintiff in Error.

GEO. CRANE, for Defendant in Error

## Argument on Motion to quash Writ of Error or affirm Judgment.

I.

From 1864 to 1873, the title to what are known as the "Des Moines River lands" in Webster County, state of Iowa, was in dispute between different claimants thereto. The Iowa Homestead company claimed the title under an act of congress approved May 15th, 1856, granting lands to the state of Iowa to aid in building certain railroads in that state. The Des Moines Navigation & Railroad company and its grantees claimed the ownership of the same lands under an act of congress, approved August 8th, 1846, granting lands to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines River. In 1868 the Homestead company commenced suit against the Des Moines Navigation &Railroad company, and its grantees to establish title to said lands, and as alternative relief asked in case of failure to obtain the title to have judgment against

the several defendants for the taxes which it had paid upon the lands during the continuance of the controversy. This suit was commenced in the District Court of Webster County, Iowa, and was then transferred to the Circuit Court of the United States for Iowa. At the final hearing in the Circuit Court the petition was dismissed. On appeal to this court the decision below was affirmed, and the right to recover the taxes paid was denied.

Under the rulings of the Supreme Court of Iowa taxes paid under the circumstances above stated, can be recovered from the successful litigant.

The Iowa Homestead company assigned and transferred its claim for the taxes paid on the lands of Grace H. Litchfield to Goodnow, the defendant in error. It is not claimed that Mrs. Litchfield was a party of record to the suit brought by the Homestead company against the Des Moines Navigation & Railroad company; but it is shown in evidence that she paid her proportion of the expenses incurred in making defense to that suit.

In the case at bar it is claimed that the decree in the Homestead suit is a bar to the right to recover in this action. The state court held that Mrs. Litchfield was neither a party to the action nor in privity with any party thereto, and hence could claim no benefit from the decree rendered therein. This is the first ground on which the plaintiff in error claims jurisdiction for this court.

II.

The second point urged as giving this court jurisdiction is, if possible, more confounded than the first. Under the law of Iowa, where one party pays the taxes upon the land of another, in order to recover them from the owner, it is sufficient to show that the payments were made in good faith and not *officiously*. In the case at bar, the state court held that the taxes sued for were not paid officiously.

As long as the Homestead company carried on the litigation in good faith and under the sincere belief of ownership in itself, the right to pay the taxes and in case of defeat, recover them back from the other party continued. And of course during such *bona fide* litigation no cause of action accrued to the Homestead company to recover the taxes paid.

The Supreme Court of Iowa decided that the controversy about the above lands was carried on in good faith till April, 1873, when the opinion of this court, in the said Homestead suit was delivered.

In the case of Wolcott vs. the Des Moines Navigation & Railroad company 5 Wall. 681, decided by this court in 1867, the same ruling was made as to the ownership of the so called Des Moines River lands that was subsequently made by this court, in the Homestead suit above mentioned. But in the Wolcott suit both parties were claimants under the act of 1846 and hence interested in defeating the claim of the Homestead company under the act of 1856. After the Wolcott case was appealed to this court counsel for the Homestead company was permitted to argue the questions raised by the record as made by the parties to that suit.

But notwithstanding the above permission and the ruling of this court in that case, the Supreme Court of Iowa held that in as much as the Homestead company was not a party to that action, the decision therein was not conclusive proof that the subsequent suit by the Homestead company against the Des Moines Navigation & Railroad company was carried on in bad faith.

In fact the decision in the Wolcott case had no bearing upon the issues in the suit now before this court, except so far as it tended to show that the Homestead suit was prosecuted in bad faith, and hence that the payment of the taxes after 1866 was officious.

The argument of appellant is this: The decision in the Wolcott case in 1867, finally settled the question of title to the lands. Any litigation after that about title was in bad faith, and any payment of taxes after that was officious. That the cause of action arose the moment that the payments became officious or when the Wolcott case decided in 1867. That the laws of Iowa provide that a cause of action against a non-resident is barred in that state when barred by the law of the state where the defendant resides, that the defendant in this suit was a citizen of New York, where a cause of action like the one in this suit is barred in six years, and that therefore this suit having been commenced in 1880, and more than six years after the decision in the Wolcott case, was barred by the statute of limitation of New York.

The Supreme Court of Iowa held that the decision in the Wolcott case was not final or conclusive upon the Homestead company, and that notwithstanding such decision, the subsequent suit by the Homestead company was prosecuted in good faith, and that the payment of taxes after that decision was not officious and therefore the New York statute was not a bar to this action.

## ARGUMENT.

### III.

The question whether Mrs. Litchfield was a party to the Homestead suit or not, is clearly not one of federal cognizance. The rule, heretofore approved by this court, seems to have been very carefully framed with a view to excluding from the jurisdiction of this court, just such questions as are presented by the record of this case. In the case of Dupasseur vs. Ratherean 21 Wall 134, the principle by which questions, like the one involved in this suit, are to be determined, is cleary enunciated in the language following:

"Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute and *with jurisdiction* of the case and *the parties* a question is undoubtedly raised which under the act of 1867, may be brought to this court for decision."

The foregoing language is quoted and approved in Embry vs. Palmer 107 U. S. 3.

As the court had no jurisdiction of Mrs. Litchfield in the Homestead suit, her case does not fall within the rule above mentioned. She was not a party to that suit, nor in privity with any party thereto, and hence was in no sense under the jurisdiction of the court when its judgment was rendered. In deciding this point, the state court decided nothing but questions of general law.

The position of the plaintiff in error is founded upon the broad assumption that whenever any right, benefit or immunity is claimed under a judgment of a federal court every question pertaining thereto is necessarily one of federal cognizance. That this is so merely because the judgment is one rendered by a federal court, and that the question whether a federal court

has jurisdiction of a person or not is of necessity a federal question. This position entirely ignores the fact that the principles of law by which the relations of any person to a suit are determined are precisely the same whether the suit is pending in a state or federal court. It is true that cases might arise in which questions as to the jurisdiction of the court over the parties might be of exclusive federal cognizance. But the case at bar is not one of them.

If the doctrine contended for by the plaintiff in error is correct then the defendant in any case can bring the same to this court for delay by merely asserting some right, privilege or immunity under some judgment of a federal court for under that doctrine a denial of such right, privilege or immunity necessarily raises a question of federal jurisdiction. But such a doctrine is entirely too broad. Where the question of jurisdiction of the party depends upon principles of general law the decision of the state court is final and this court has no appellate power over the matter.

Under the rule recognized since the act of congress of July 5th, 1867 this court is authorized to examine the opinions of the state courts to ascertain what has been decided.

Murdock vs. Memphis 20 Wall, 633.

McManus vs. Sullivan 91 U. S. 578.

The opinion of the state court is this case on the question of prior adjudication contains the following:

It is argued by counsel for defendant, that the evidence supports the defense of prior adjudication pleaded by defendant. The facts upon which he relies to support this position, are as follows: In 1868 the Iowa Homestead company brought an action in chancery against the Des Moines Navigation company and others to quiet the title to the lands held by it under the grant to the Dubuque & Sioux City Railroad company, of which the lands whereon the taxes in question were levied, were originally a part. The defendant was not a party to this action. In addition to the specific relief indicated, the petition prayed that if the title was not found to be in plaintiff, the defendant should by proper decree, be required to pay plaintiff the sums expended by it in payment of taxes. This case was finally decided in the United States Supreme Court adversely to plaintiff, and it was held that recovery for taxes paid could not be had. It is shown that although defendant was not a party to that action, *she contributed to the*

*payment of the expenses of its defense, and that her agent had knowledge of the pendency of the action.* It is shown by an agreed statement of facts, that defendant held title to the land in 1863.

It appears from the foregoing statement that defendant had no such interest in the action that the decision and judgment therein, would bind her. It cannot be claimed that had the judgment been against the defendants that she would have been bound thereby: nor does it appear that any relation of agency or tenancy existed between her and the defendants, or any of them to defend the suit for her benefit. While one of the defendants was probably her grantor, yet she had held the title from a time anterior to the payment of the taxes in controversy in this case. No recovery could have been had against any of them for the amounts paid upon the taxes on her land. Therefore she could not have been held liable over to the defendants or any one of them. She therefore, had no such interest in the case, nor liability on account of any judgment that was, or could have been entered in it, which would have estopped her to deny the judgment. It is a familiar rule that estoppels by judgment, must be mutual and that one party cannot be bound if the other is not."

It will be observed that the decision of the state court rests upon the doctrine that the simple payment of a portion of the expenses of defending a lawsuit will not entitle the person so paying to the protection or benefit of the judgment therein rendered and that this is true even though the person paying may be interested in questions similar to those involved in that suit. In this ruling the court decided nothing but questions of general law and the decision falls within the principle of law recognized by this court in the case of

The New York Ins. Co., vs Hendren 92 U. S. 287.

Rockhold vs. Rockhold, 92 U. S. 130.

V.

The second ground set forth in the certificate on which to sustain the jurisdiction of this court is entirely insufficient. It in no sense raises a federal question. The decision in the Wolcott case referred to in the certificate has no bearing upon any issue in the case at bar except so far as it tends to show that the payment of the taxes after the opinion in that case was announced were made in bad faith or officiously and that the statute of limitations began to operate at that time. These are clearly not questions of federal cognizance.

See pages 9 & 11 of Argument in case 4 & 5 & argument 350

MOTION TO AFFIRM.

Should the court conclude that it can take jurisdiction of this case then we insist that the motion to affirm should be sustained. It is clear that the case was brought here for delay only. This is shown by the utterly frivolous character of the questions raised for this court's consideration.

It is conceded that Mrs. Litchfield was not a party of record in the Homestead suit. There is no possible ground on which it can be said that she was in privity with any of the defendants therein. It is clear therefore that she cannot claim any benefit from the adjudication made in that case.

Kerr vs. Watts 7 Wheaton, 552.

The sole and only connection that she had with that case was to pay a pro rata share of the expenses of defending it. This was done simply because she was interested in similar questions of law and fact.

To have recovered in that suit the taxes paid on her lands it would have been necessary to show the payment of her taxes. But no evidence could have been introduced to prove such payment. It would have been clearly irrelevant and inadmissible for the plain reason that none of the defendants were in any manner liable for the taxes on her lands.

Any judgment for the defendants therein would have been only for the taxes paid upon their land and could not possibly have been for the taxes paid upon lands owned by her. Hence evidence as to the payment of her taxes could not have been received. It is clear therefore that the plaintiff's right to recover as against her could not have been adjudicated in that suit.

Again, it is a fundamental principle of law that a judgment, in order to constitute an estoppel, must be mutual in its operation. There can be no pretense that if the decision of the court in the Homestead suit had been the other way any decree could have been entered binding upon Mrs. Litchfield. No decree could have been made that would have operated as an estoppel ag'st her, and hence she can receive no benefit from the decree actually rendered.

Should the court overrule the motion to dismiss the writ of error, we insist that for the reasons above stated the decree of the state court ought to be affirmed.

GEORGE CRANE,
Attorney for Appellee.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 44.

E. H. LITCHFIELD, Adm'r, Plaintiff in Error,

*vs.*

GEO. CRANE, Administrator, Defendant in Error.

ON ERROR FROM THE SUPREME COURT OF IOWA.

## Brief in Reply.

C. H. GATCH and WM. CONNOR, for Plaintiff in Error.
GEO. CRANE, for Defendant in Error.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

IN THE

# Supreme Court of the United States.

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E. H. LITCHFIELD, Adm'r,
*Plaintiff in Error,*
*vs.*
GEO. CRANE, Administrator,
*Defendant in Error.*

No. 44.

*On Error from the Supreme Court of Iowa.*

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C. H. Gatch and William Connor, *for Plaintiff in Error.*
Geo. Crane, *for Defendant in Error.*

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## BRIEF IN REPLY.

### I.

In answer to that part of our opening argument in which it is claimed that defendant in error is estopped by the adjudication in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 173, it is objected that that adjudication was void, for want of jurisdiction, the alleged want of jurisdiction consisting of the fact that all of the defendants in the former suit were not citizens of a different state from that of which the plaintiff was a citizen.

After the cause was removed to the United States circuit court, the plaintiff Homestead company, October, 23, 1870, "by leave of court and consent of counsel," amended its petition (Fol. 27). Previously to this, but after the removal (31–32), it stipulated that the answers of certain named defendants, in-

cluding its own, should "be deemed and taken as the answer of the several defendants herein." When the cause came on for hearing in the circuit court, it stipulated as to what questions it should be heard upon, and that it should not be heard upon any other (32–33), and the decree of the court recited that on the hearing it appeared by Elwood, Nourse and Withrow.

After the hearing and decree in that court, a written stipulation was filed, in which it joined with the other defendants, by which it was, among other things, stipulated as follows:

> And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade and John Stryker, each and all of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified. * * * And it is furthur stipulated and agreed that the answer of defendant William B. Welles, verified by him, with the necessary changes and variations, to show and present the proper and respective interest of defendants Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade and John Stryker, *and* the Des Moines Navigation and Railroad Company, shall be taken, treated and deemed the answer of said last mentioned defendants herein (35).

And, finally, after the case came into this court, it again stipulated that the evidence in the court below established certain facts therein recited (35–36).

It would certainly be most remarkable if, upon such a record, after final decree in this court, the validity of the decree could be collaterally assailed and treated as a nullity. Without going into an elaborate discussion of the question, we are content to submit it upon the following authorities.

In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, it was held "too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate."

The case came to this court upon the following certificate of division:

> In this case a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the

cause was sent back to this court it was discovered to be a case not within the jurisdiction of the court; but the question arose, whether it can now be dismissed for want of jurisdiction after the supreme court has acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered "that the same be adjourned to the supreme court for their decision."

The court determined the question as follows:

It appearing that the merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.

In *McCormic vs. Sullivant*, 10 Wheat., 192, it was held:

The courts of the United States are courts of *limited* but not *inferior* jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error and appeal, but until reversed they are conclusive evidence between parties and privies.

Defendants relied upon the former decree of one of the Federal courts in a suit where the record failed to show the citizenship of the parties to be such as was requisite to confer jurisdiction. It was claimed that by reason of this defect the suit was *coram non judice*, and the decree therefore void; but the court, on page 199, said:

But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error, or appeal, be reversed for that cause. *But they are not absolute nullities.*

And on same page, referring to the case of *Skillern's Execrs. vs. May's Execrs.*, used the following language:

That suit came before this court upon a writ of error, where the decree of the court below was reversed and the cause remanded for further proceedings to be had therein. After this it was discovered by that court that the jurisdiction was not stated in the proceedings, and the question was made, whether that court could dismiss the suit for that

reason? This point, on which the judges were divided, was certified to the supreme court, where it was decided that the merits of the cause having been finally decided in this court and its mandate only requiring execution of its decree, the court below, was bound to carry that decree into execution *notwithstanding* the jurisdiction of that court was not alleged in the pleadings. Now, it is very clear that, if the decree had been considered a nullity, on the ground that jurisdiction was not stated in the proceedings, this court could not have required it to be executed by the inferior court.

In *Kennedy et al. vs. Georgia State Bank et al.*, 8 How., 586, it was held that—

If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous and liable to be reversed, but is not an absolute nullity.

In this court the record was, by consent, so amended as to show jurisdiction. The court, on page 611, uses this language:

But if no amendment had been made, would the orders and decrees in the case by the circuit court have been nullities? That they would have been erroneous and liable to be reversed is admitted. In *Skillern's Ex'rs vs. May's Ex'rs*, 6 Cranch., 267, a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to the circuit court, it was discovered to be a *cause not within the jurisdiction of the court;* but a question arose whether in that court it could be dismissed for want of jurisdiction *after the supreme court had acted thereon.* The opinion of the judges being opposed on that question, it was certified to the supreme court for their decision, and this court held "that the circuit court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

In *Washington Bridge vs. Stewart*, 3 Howard, 413, it was held:

After a case has been decided upon its merits and remanded to the court below, if it is again brought up on a second appeal it is then too late to allege that the court had not jurisdiction to try the first appeal.

The court say, on page 424: "The want of jurisdiction is a a matter of abatement;" and further, on same page, referring to the case of *Skillerns' Executors vs. Mays' Executors*, 6 Cranch., *supra:*

The jurisdiction of this court in that case was as defective as it is said to have been in this, when that cause was before this court, though the

judgment of the court below on it would have been reversed upon motion for the want of jurisdiction, *on the face of the record*, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment, no doubt, was that the motion to dismiss the case in the court below for the want of jurisdiction, after it had been before the supreme court by writ of error and had been acted upon, would have been equivalent had it been allowed to a decision that the judgment of this court might be reviewed when law points out no mode in which that can be done either by this or any other court.

In *DeSobry vs. Nicholson*, 3 Wallace, 420, it was held:

A motion to dismiss a case from want of proper citizenship in the parties cannot be made at the trial and after pleading a general issue and special defenses.

The court say, on page 423:

The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue it is too late. It cannot be raised at the trial upon the merits. If a plea in abatement be filed with the general issue the latter waives the former. Where a plea in abatement is relied upon the burden of proof rests upon the defendant. In equity the defense must be presented by plea or demurrer and not by answer. The court below properly overruled the motion.

## II.

Upon the question as to when and how far this court will consider and determine questions of state or common law, "for purposes which involve questions giving it jurisdiction," we here refer to the following additional authorities:

*Martin vs. Hunter*, 1 Wheat, 304, was an action of ejectment in which the plaintiff claimed title under a patent from the state of Virginia and the defendant as devisee of Lord Fairfax by a title which it was claimed by plaintiff was invalid; first, because Lord Fairfax, at the time of his death, had not acquired the absolute property in the land by actual seizin and possession; and, second, because the devisee was an alien at the time of the testator's death and could therefore not take the land by devise.

The validity of the plaintiff's patent depended upon whether

or not the title of Lord Fairfax had, for either of the reasons stated, escheated to the state. If it had, it was prior to the definitive treaty of peace between the United States and England of September 3, 1783, by the sixth article of which it was provided that there should "be no future confiscation made nor prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the war." The defendant claimed that his title had not been in any manner confiscated prior to the treaty, and that it was therefore protected by it, under this provision of the sixth article. The decision of the lower court in favor of the defendant was reversed by the court of appeals, and judgment rendered for the plaintiff. On error to this court, in argument on behalf of defendant in error, it was said, page 317:

> It does not appear upon the face of the record that the judgment was upon the treaty. It was not upon the treaty. The court of appeals, in their judgment, have expressly declared that it was not upon the treaty, by affirming that part of the judgment of the district court at Winchester which determined in favor of the treaty.

And again on the same page:

> The determination of the court was not limited, in any degree, to the construction of the treaty, which was only one of the numerous facts stated on which the title of the parties depended. How can this court ascertain on which of these facts the state court determined, or that it determined upon the treaty? The alienage of Lord Fairfax's devisee, and the question whether the lands did not escheat, without office found, might have been the point of decision, avoiding to consider the construction or validity of the treaty, which applies only to things confiscable.

Referring to which the court on pages 357, *et seq.*, say:

> The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the court of appeals, and that their judgment is not re-examinable here, unless it appear on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and *non constat*, that they did not), independent of the treaty, there is an end of the appellate jurisdiction of this court. * * * If this be the true con-

struction of the section it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction, and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty and the decision is against the title set up by the party. It is therefore a decision *against the title set up with reference to the treaty*, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case there must be a *preliminary inquiry* into the existence and structure of the title before the court can construe the treaty in reference to that title.

*If the court below should decide that the title was bad, and therefore not protected by the treaty, must not this court have a power to decide the title to be good, and therefore protected by the treaty?* * * * One of the questions is, as to the construction of a treaty, upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparrent upon the face of the record, and immediately respects the decision of that question; and error, therefore, *in respect to that title*, must be re-examinable, or the case could never be presented to the court. * * * But the point has been already decided by the court upon solemn argument. In *Smith vs. State of Maryland*, (6, Cranch, 286), precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. This case was in some respects, stronger than the present; for the court below decided expressly, that the party had no title, and therefore, the treaty could not operate upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

In the dissenting opinion of Johnson, J., page 369, it is said:

If there is any point in the case on which an opinion may be given with confidence it is this: whether we consider the letter of the statute or the spirit intent or meaning of the constitution and of the legislature, as expressed in the 27th section, it is equally clear, that the title is the primary object to which the attention of the court is called in every such case. The words are, "and the decision be against *the title*," so set up, not against the *construction of the treaty* contended for by the party setting up the title. And how could it be otherwise? The title may exist, notwithstanding the decision of the state courts to the con-

trary; and in that case the party is entitled to the benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of those very errors, partialities or defects in state jurisprudence against which the constitution intended to protect the individual.

*Smith vs. Maryland*, 6 Cranch, 286, was a suit to compel the conveyance of land the legal title to which was held in trust for a British subject, and the equitable ownership of which was claimed by parties on behalf of whom the suit was prosecuted, as property that had been confiscated by the state. The question was whether *according to the laws of Maryland* the confiscation was complete. It was held that—

A writ of error lies to the highest court of the state in a case where the question is, whether a confiscation *under the laws of the state*, was complete before the treaty of peace with Great Britain.

In the decree of the state court, it was said—page 289:

If this property was confiscated and the right to it vested in the state by the acts of October, 1780, C. 45 & C. 49 the Chancellor does not perceive how it can be affected by the 6th article of the treaty of 1783, declaring that there should be no future confiscation made.

In argument, on behalf of the defendant in error it was said—page 301: "The courts of the United States have no jurisdiction in the case, because the only question is whether *by the laws of Maryland* the property was completely confiscated before the treaty of peace. If it was, the treaty does not apply; if it was not the treaty protects it." And again, on the same page: "This is not a cause dependent upon the construction of the treatise but upon the laws of Maryland. If by those laws the property was not confiscated before the treaty of peace we admit that it cannot now be confiscated. If it was confiscated the treaty does not apply."

Referring to which it is said in the opinion, page 304;

It is contended by the defendants in error that the question involved in the case turns exclusively upon the construction of the confiscation laws of the state of Maryland passed prior to the treaty of peace, and that no question relative to the construction of that treaty did or could occur. That the only point in dispute was whether the confiscation of the land in controversy was complete or not by the mere operation of those laws without any further act done.

The court, nevertheless, proceeded to consider and determine the question, whether or not the confiscation was complete under the laws of the state of Maryland, before the treaty, and finding and holding that it was, affirmed the judgment of the state court.

If this court could, in these cases, because of its relation to a federal question, consider and determine, as a question of state law, whether or not a property right had been lost, *by confiscation*, why may it not, in this case, for the same reason, consider and determine whether or not the plaintiff in error, in any other manner, depending on state or common law, lost the immunity he would otherwise be entitled to, under the judgment in question.

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